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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 173

JAMES G. PACE, PETITIONER

v.

LAURIE W. TOMLINSON, DIRECTOR OF INTERNAL REVENUE FOR THE STATE OF FLORIDA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Court of Appeals (Pet. App. I, 1-10) is reported at 220 F. 2d 308.

JURISDICTION

The judgment of the Court of Appeals was entered on March 25, 1955. (Pet. App. II, 1.) The petition for a writ of certiorari was filed on June 22, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

Pending the prosecution of a suit by petitioner herein and another taxpayer to enjoin the collection of a social security tax which they had returned, the District Court entered an order requiring the Director of Internal Revenue to accept in lieu of a recorded lien against the two taxpayers a bond conditioned differently from the bond prescribed by statute and normally used by the Commissioner of Internal Revenue in his discretion. The order also directed that the Government's lien for the taxes be cancelled. The questions presented are:

1. Whether the court below erred in holding that the District Court's order was appealable.

2. Whether the court below erred in holding that the District Court had no authority to require the Director to accept the bond tendered by taxpayer, or to order the cancellation of the Government's tax lien.

STATUTES AND OTHER AUTHORITY INVOLVED

The pertinent statutory and regulatory provisions involved, Sections 3653 and 3673 of the Internal Revenue Code of 1939 and Sections 1291 and 1292 of 28 U. S. C., and T. D. 4275, VIII-2 Cum. Bull. 167 (1929), as amended by T. D. 4591, XIV-2 Cum. Bull. 265 (1935), are set forth in the Appendix, *infra*, pp. 10-12.

STATEMENT

This action was brought to enjoin the Director from collecting withholding taxes, Federal Insurance Contributions Act taxes and Federal Un-

employment Tax Act taxes assessed against Sidney Poller and James G. Pace[1] in the amount of $2,358.22.

The allegations of the complaint (R. 1-4) may be summarized as follows:

During the year 1949, and until April 11, 1952, the taxpayers and one L. H. Quigley acted as members of a committee for the benefit of the creditors of General Engineering Company, now bankrupt and dissolved, and as such carried on the activities and functions of that corporation.

Pursuant to the requirements of the Internal Revenue Code of 1939, the taxpayers filed various employer's quarterly federal tax returns for the last quarter of 1949 and the first quarter of 1950, reporting withholding F. I. C. A. and F. U. T. A. taxes in the total amount of $2,358.22.

During the operation of General Engineering Company, the taxpayers were at no time actual officers or directors of that corporation but were merely acting as agents and representatives of the creditors of the corporation for the mutual benefit of all parties concerned.

On October 2, 1953, the Director, it was claimed, wrongfully filed against the taxpayers a tax lien for the taxes reported by them in the amount of $2,358.22 and demanded payment of that amount with interest and penalties. And it was further claimed that the taxpayer had no notice of the mak-

[1] Although Poller and Pace were plaintiffs in the District Court only Pace is petitioning in this Court. Where both are involved, they will hereinafter be referred to as the taxpayers.

ing of the assessment until October 2, 1953, when notice of lien was filed by the Director in the Circuit Court of the Eleventh Judicial Circuit for Dade County, Florida.

The assessment was alleged to be erroneous on the ground that the statute of limitations had run prior to its making, and it was also claimed to be capricious and without foundation in fact or law.

The taxpayers are attorneys at law and are active in purchasing and selling real estate in Dade County, Florida, and it was alleged that as a result of the filing of the notice of lien, title to property not specified had become clouded and unmarketable.

The complaint then prayed that the court grant a temporary injunction, and, after trial, a permanent injunction.

Subsequently, the taxpayers moved for a preliminary injunction which the court denied on October 30, 1953. (R. 10-11.) This order provided that the case would not be dismissed, but that the Director would be required to answer.

On November 25, 1953, taxpayer Pace filed a petition (R. 11-12) for permission to file a bond for the purpose of releasing the federal tax lien referred to in the complaint, alleging that he had tendered to the Director a bond pursuant to Section 3673 of the Internal Revenue Code of 1939 which the Director had refused to accept; and that the Director had requested Pace to file a bond on Treasury Form 1131, which Pace refused to do because the effect

of filing a bond upon the form requested would be to admit liability for the contested assessment and would work as a waiver of any rights which Pace might have under his original complaint. This petition prayed that the court enter an order requiring the Director to accept the bond as tendered by Pace, a copy of which was attached to the petition. (R. 14-15.)

On December 8, 1953, after hearing upon this petition, the District Court entered an order (R. 16-17) that the bond tendered by taxpayer Pace be approved and that the notice of lien filed in the office of the Clerk of the Circuit Court of Dade County, Florida, be cancelled and be of no further force and effect.

Upon appeal by the Director of Internal Revenue, the Court of Appeals reversed the order of the District Court and directed the reinstatement of the Government's liens (Pet. App. I, 1-10, Pet. App. II, 1).

ARGUMENT

1. The court below correctly followed the rules laid down by this Court in *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, and *Swift & Co.* v. *Compania Caribe,* 339 U. S. 684, in holding appealable the order of the District Court requiring the Director of Internal Revenue to accept the taxpayer's bond and discharging the Government's tax liens. The District Court's order is clearly a final decision under 28 U. S. C., Section 1291 (Appendix, *infra,* p. 11), as that term is construed in those cases. That order determined finally claims of right sepa-

rable from and collateral to the principal issues in the case, namely, whether the taxpayer is liable for the taxes involved and, if not, whether he is entitled to an injunction against their collection. The question whether the Director may be compelled to accept a bond, not in accordance with the statute, in lieu of the lien which Congress has provided for the enforcement of the collection of taxes owing the United States is independent of the principal cause of action and is a question too important to require that appellate consideration be deferred until the entire case is finally adjudicated. Thus, the reasoning in the *Swift & Co.* case, *supra,* is plainly controlling. In that case, the trial court had dismissed an attachment in aid of a libel against a ship alleged to belong to the respondent. Although the litigation arising out of the claim of the libellants had not run its entire course, nevertheless this Court held the questioned order to be reviewable, stating in language fully apt here (p. 689):

> Appellate review of the order dissolving the attachment at a later date would be an empty rite after the vessel had been released and the restoration of the attachment only theoretically possible. * * *. Under these circumstances the provision for appeals only from final decisions in 28 U. S. C. Sec. 1291 should not be construed so as to deny effective review of a claim fairly severable from the context of a larger litigious process. * * *

Obviously, the applicability of this reasoning to the Government's lien for taxes here is in nowise lessened by reason of the taxpayer's having put up an inadequate bond as a substitute.

And if it were considered to be interlocutory, the District Court's order would still be appealable under 28 U. S. C., Section 1292(1) (Appendix, *infra,* p. 11), because, as the court below pointed out (Pet. App. I, 8-9), its effect was simply to prevent the collection of the tax. It is true that the District Court declined to grant the temporary injunction requested by the taxpayer (R. 10-11), but the court's order here under discussion "is as effective in these respects as an injunction issued by a chancellor. * * *. The relief afforded by * * * [the statute] is not restricted by the terminology used. The statute looks to the substantial effect of the order made." *Ettelson* v. *Metro. Ins. Co.,* 317 U. S. 188, 192.

2. Section 3673 of the Internal Revenue Code of 1939 (Appendix, *infra,* p. 10) confers upon the Director the discretionary power to release a lien upon receipt of a bond in conformity with that section. No authority exists for the District Court's interference with the exercise of that discretion by the Director. The District Court's error is emphasized by the fact that the bond tendered does not conform to the terms of the statute. As the appellate court correctly observed (Pet. App. I, 9), since the lien was specifically authorized by statute "it could be released only in accordance

with the provisions of the statute." *Metropolitan Life Ins. Co.* v. *United States,* 107 F. 2d 311 (C. A. 6), certiorari denied, 310 U. S. 630.

The substantial effect of the District Court's order was to permit the sale of taxpayers' property free of the Government's lien and to permit the taxpayer to defer payment of the taxes until after he has contested liability for such payment, contrary to the long-established scheme of federal taxation and the specific provisions of Section 3653 of the Internal Revenue Code of 1939 (Appendix, *infra,* p. 10) which prohibits suits to restrain assessment or collection of any tax.

3. It is clear that no conflict of decision exists by reason of the holding of the court below that the order in controversy is a final decision, for "The concept of finality does not require a judgment completely disposing of every matter or issue that arises in the litigation." *Baltimore Contractors* v. *Bodinger,* 348 U. S. 176, 179, fn. 4. Accordingly, the many cases cited by the taxpayer in his endeavor to establish the contrary are not apposite here (Pet. 6-8).

Moreover, as taxpayer's counsel conceded at the oral argument in the court below (Pet. App. I, 7), no exceptional or extraordinary circumstances are alleged which are sufficient to bring this case within any exception to the statutory prohibition against the maintenance of suits to restrain the assessment or collection of federal taxes.

CONCLUSION

The decision below is correct and further review is not warranted. The petition for a writ of certiorari should be denied.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.
H. BRIAN HOLLAND,
Assistant Attorney General.
ELLIS N. SLACK,
A. F. PRESCOTT,
WALTER AKERMAN, JR.,
Attorneys.

JULY, 1955.

APPENDIX

Internal Revenue Code of 1939:

SEC. 3653. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) *Tax.*—Except as provided in sections 272(a), 871(a) and 1012(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

* * * * *

(26 U. S. C. 1952 ed., Sec. 3653.)

SEC. 3673. RELEASE OF LIEN.

Subject to such regulations as the Commissioner, with the approval of the Secretary, may prescribe, the collector charged with an assessment in respect of any tax, may issue a certificate of release of the lien if—

* * * * *

(b) *Bond Accepted.*—There is furnished to the collector and accepted by him a bond that is conditioned upon the payment of the amount assessed, together with all interest in respect thereof, within the time prescribed by law (including any extension of such time), and that is in accordance with such requirements relating to terms, conditions, and form of the bond

and sureties thereon, as may be specified in the regulations.

(26 U. S. C. 1952 ed., Sec. 3673.)

28 U. S. C.:

SEC. 1291. *Final decisions of district courts*

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * * except where a direct review may be had in the Supreme Court.

SEC. 1292. *Interlocutory decisions*

The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States * * * or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

* * * * *

T. D. 4275, VIII-2 Cum. Bull. 167 (1929), as amended by T. D. 4591, XIV-2 Cum. Bull. 265 (1935):

* * * * *

The collector may in his discretion issue a certificate of release of the tax lien if he is furnished and accepts a bond that is condi-

tioned upon the payment of the amount assessed (together with all interest in respect thereof) within the time agreed upon in the bond, but not later than six months prior to the expiration of the statutory period for collection, including any period for collection agreed upon in writing by the Commissioner and the taxpayer. The form of any bond so furnished shall be the standard form (Form 1131), entitled "Bond for release of Federal tax lien." Such bond shall be executed by a surety company holding a certificate of authority from the Secretary of the Treasury as an acceptable surety on Federal bonds, except that, when specifically authorized by the Commissioner, such bond may be executed by a surety or sureties, individual or corporate, other than a surety company.

* * * * *

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 173

JAMES G. PACE, *Petitioner*

v.

LAURIE W. TOMLINSON, *Director of Internal Revenue for the State of Florida*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 173

JAMES G. PACE, *Petitioner*

v.

LAURIE W. TOMLINSON, *Director of Internal Revenue for the State of Florida*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant rehearing of its order of October 10, 1955, denying the petition for writ of certiorari, and that a writ of certiorari issue to revue the judgment of the Court of Appeals for the Fifth Circuit in the above entitled case as prayed for in the petition filed June 20, 1955 herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. At the time of the Court's order of October 10, 1955, there was a defect in the Complaint as originally

filed in the District Court. The Complaint failed to allege specifically that the petitioner did not have in his hand, control or possession the taxes withheld by the General Engineering Co., thereby, clearly showing that the petitioner was not liable for the taxes involved herein. This defect was discussed during the oral argument in the Circuit Court of Appeals for the Fifth Circuit and was mentioned on Page Seven (7) of the Circuit Court's opinion.

Since this Court's order of October 10, 1955, the petitioner filed an Amended Complaint in the District Court for the Southern District of Florida which has cured the aforementioned defect. (A copy of the Amended Complaint of Petitioner is appended hereto.)

The Complaint now shows that the petitioner was acting as an advisor to the creditors of the General Engineering Co. and that he at no time had in his hand, possession or control the taxes withheld by the General Engineering Co. He was a legal stranger to the taxes here in question, as admittedly, no tax was due from petitioner and none is claimed against him on account of his separate or individual income.

We now have a situation wherein the Director, in attempting to enforce an asserted liability against petitioner becomes a trespasser and when this is taken into consideration with the fact that the Director's filing of Notice of Lien clouded legal title and made unmarketable certain property which petitioner had legal title to as Trustee for his clients and business associates, it can only be concluded that extraordinary and exceptional circumstances exist so as to bring this case within the ex-

ception to the statutory prohibition against the maintenance of suits to restrain an assessment for collection of Federal taxes, as laid down by this Court in MILLER v. STANDARD NUT MARGERINE COMPANY, 284 U. S. 498.

It requires no elaboration of the facts, that the Notice of Lien will destroy petitioner's law practice and business, ruin him financially and inflict a loss for which he has no remedy at law. For these reasons, the District Court exercised its equitable jurisdiction.

2. The question continues to be one of large practical importance in the administration of the Internal Revenue Code. Assessments involving substantial sums of money—often far greater than that involved in the instant case—have been, and will continue to be, issued by the Director of Internal Revenue. To deny the District Court jurisdiction to cancel liens for the substitution of a bond when exceptional and extraordinary circumstances demand it, would defeat the ancient principals of equity jurisprudence and could destroy many a taxpayers business, ruin him financially and inflict loss from which there is no remedy at law.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

JAMES G. PACE, Petitioner.

CERTIFICATE OF PETITIONER

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

Petitioner

APPENDIX

Amended Complaint of Petitioner

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION. — CIVIL No. 5159-N.

SIDNEY POLLER and JAMES G. PACE, Plaintiffs, -vs- LAURIE W. TOMLINSON, Director of Internal Revenue in the State of Florida, for the United States of America, Defendant.	AMENDED BILL OF COMPLAINT

LEAVE OF COURT first having been obtained to file this Amended Bill of Complaint, the plaintiff, JAMES G. PACE, states:

I.

That plaintiff, JAMES G. PACE, is a resident of Dade County, Florida, and is over the age of twenty-one (21) years.

II.

That defendant, LAURIE W. TOMLINSON, is the District Director of the United States Internal Revenue

Service for the District of Florida, and at all times alleged in this Complaint, held the office of District Director of Internal Revenue Service and that at all times alleged prior to taking office as District Director of Internal Revenue Service by Laurie W. Tomlinson, G. L. FASS held the office of Collector of the United States Internal Revenue Bureau for the District of Florida.

III.

That the defendant, on October 2, 1953, did wrongfully cause to be filed against the plaintiff, a tax lien for Federal Income Taxes Withheld from Wages, Federal Insurance Contribution Taxes, and Federal Unemployment Act Taxes in the amount of Two Thousand, Three Hundred and fifty-eight dollars and twenty-two cents ($2,358.22), together with interest and penalties. The amount of taxes was based upon returns filed by the GENERAL ENGINEERING COMPANY the last quarter of 1949 and the first quarter of 1950. A copy of the Notice of Federal Tax Lien was served upon the plaintiff, and is attached to the original Complaint filed herein and made a part hereof.

IV.

That on June 30, 1953, the plaintiff was included on an Assessment List as a result of the non-payment of the alleged tax assessment, which Assessment List was executed by the Commissioner of Internal Revenue on or about July 15, 1953; that plaintiff had no knowledge of said assessment prior to the Notice of Lien filed by defendant on October 2, 1953 in the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida, and

plaintiff at no time was given an opportunity to be heard on the validity or accuracy of the alleged claim for taxes.

V.

That the assessment is clearly, without a question of doubt, erroneous and faulty, and is capricious and without foundation in fact or law.

VI.

That during the year 1949, and until on or about April 11, 1952, plaintiff, JAMES G. PACE, acted as a member of a committee for the benefit of the creditors of the GENERAL ENGINEERING COMPANY, formerly a Florida Corporation, now bankrupt and dissolved.

VII.

That during the operation of the GENERAL ENGINEERING COMPANY, plaintiff, JAMES G. PACE, was at no time the actual officer or director of said corporation, but was merely acting in the capacity of an advisor for the creditors of the GENERAL ENGINEERING COMPANY, and at no time during the operation of GENERAL ENGINEERING COMPANY did the plaintiff, JAMES G. PACE, have in his hand, possession or control the aforesaid Income Taxes Withheld from Wages, Federal Insurance Taxes and Federal Unemployment Taxes in the amount of Two Thousand, Three Hundred and fifty-eight dollars and twenty-two cents ($2,358.22) as mentioned in Paragraph "III" of this Amended Bill of Complaint.

VIII.

That the plaintiff, JAMES G. PACE, is an attorney at law, member of the Florida and Federal Bar, and enjoys a good reputation both professionally and personally, which reputation has been damaged and besmerched by the actions of the defendant and as a result thereof, the law practice of the plaintiff has been irreparably damaged and injured; that said actions of the defendant have been publicized and the past actions of the defendant, and the continued actions on the part of the defendant in pursuing this wrongful and erroneous course of conduct, will irreparably injure and damage the plaintiff, for which the plaintiff has no adequate remedy at law.

IX.

That the plaintiff, JAMES G. PACE, is active in the purchasing and selling of real estate situated in Dade County, Florida, and holds legal title to certain property as a trustee, and as a result of defendant's filing the aforesaid Notice of Lien, the title to said property has become clouded and as a result thereof, not marketable, which results have irreparably damaged the plaintiff.

WHEREFORE, plaintiff prays that this Court take jurisdiction over the parties hereto and over the subject matter, and further,

That this Court enter a temporary injunction against defendant from levying against the goods and chattels of the plaintiff and that upon final hearing, said injunction be made permanent,

That this Court enter a temporary injunction restraining defendant from making said assessment a matter of record on the records of Dade County, Florida, and that upon final hearing, said injunction be made permanent, and

That this Court grant such other and further relief to plaintiff as it shall deem fit and proper.

JAMES G. PACE, Plaintiff

STATE OF FLORIDA
COUNTY OF DADE SS:

PERSONALLY appeared this day before me, the undersigned authority, JAMES G. PACE, who being by me first duly sworn, deposes and says he is the plaintiff herein and he executed the foregoing Amended Bill of Complaint; that he has read the allegations in said Amended Complaint and that said allegations are true and correct except as to those matters alleged upon information and belief, and as to those matters he believes them to be true; that he did in such capacity execute the foregoing Amended Complaint.

SWORN to and subscribed before me, this, the_____day of October, 1955.

NOTARY PUBLIC STATE OF FLORIDA AT LARGE
My commission expires: